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No. 95-1100

In The

Supreme Court of the United States

October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

vs.

JILL BROWN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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The arguments advanced by respondent cover a very large waterfront. She engages in a disquisition on the law of vicious dogs (Respondent's Brief at pp. 39-41), describes the psychological process by which pre-schoolers internalize the meaning of "fault" (p. 46) and reports results of a haphazard survey of "every case in the Federal Reporters since late 1985" announcing dollar amounts plaintiffs have retained on appeal in 42 U.S.C. § 1983 cases against municipalities. (p. 48 n. 27). That sort of rhetoric sheds little light on the scope of § 1983 liability in suits against municipalities.

When respondent speaks to the issue of municipal liability, she avoids the most conspicuous questions posed in the case: Is it *unconstitutional policy* for a sheriff to hire a reserve police cadet who has pleaded guilty to misdemeanor assault for his role in a college-campus fight? Is it "obvious" that hiring a person with one misdemeanor assault would result in his subsequent violation of a citizen's constitutional rights? Was § 1983 intended to vest federal courts with authority to veto State legislation governing qualifications of law enforcement personnel?

Respondent's case fails for three reasons. It fails because Bryan County's hiring of Stacy Burns was not an unconstitutional "policy" with implications beyond the singular hiring decision itself; therefore, the hiring of Burns cannot form the basis for holding Bryan County liable under § 1983. Second, there is no proof to a "moral certainty" (or even preponderance of evidence) that hiring an officer with one misdemeanor assault conviction would cause his subsequent use of unconstitutional force during the course of an arrest. Finally, it fails because federal courts should not be in the business of supplanting State laws governing personnel qualifications when there is no evidence that the State, or any of its agencies, has ever been placed on notice that conformity with State hiring standards necessarily portends the deprivation of constitutional rights.

I.

THERE IS NO EVIDENCE THAT BRYAN COUNTY ADOPTED UNCONSTITUTIONAL POLICY OF INADEQUATE SCREENING.

A. Bryan County Has Consistently Argued That Oklahoma's Laws, Rather Than Sheriff's Particular Hiring Decision, Represent County's Final Employment Policy.

Both respondent and her *amicus curiae* have accused Bryan County of raising the question of Sheriff Moore's authority to enact final policy "for the first time in any court." (Respondent's Brief at pp. 1 n. 1, 23-24); (NOW *Amicus* Brief at pp. 10-11). They are both wrong.

In its main brief in the Fifth Circuit, Bryan County argued, as it has here, that Sheriff Moore's authority to hire Burns does not necessarily equate with authority to adopt final employment policy for the County. Bryan County's brief argued:

> . . . the Court clarified in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) that "[m]unicipal liability attaches only where the decisionmaker possesses *final* authority to establish municipal policy with respect to the action ordered. The fact that a particular official — even a *policymaking official* — has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Id.* at 481-82 (emphasis supplied).

> *Pembaur* thus made clear that municipal liability cannot hinge on the mere fact that the sheriff, even in the role of "policymaker", hires and fires employees. *Id.* at 483 n. 12.[1] Since there is no evidence that Bryan County's Board of Commissioners delegated its power to establish final employment policy to the Sheriff, there is no basis for § 1983 liability against the County with respect to its hiring policies.

(Appellants' Brief at p. 22).

In addition, the County's objections to the district court's jury charge articulated why Sheriff Moore's decision to hire Burns could not have been County "policy" under § 1983. First, the County argued that the Sheriff's conformity with State law supported a good-faith defense to liability. (J.A. 124a). Second, Bryan County specifically objected to the court's jury instruction that Sheriff Moore's hiring of Stacy Burns constituted County "policy" and argued that there is no evidence of the adoption of any "policy" by the Sheriff. (J.A. 124a-125a, 130a). Bryan County requested the court to affirmatively instruct the jury that the County had complied with all State regulations regarding hiring and training. (J.A. 128a). Bryan County advanced these same arguments in its certiorari petition. (Petition for Writ of Certiorari at pp. 6-7, 9-11, 17).

The question of Sheriff Moore's authority to make *final* employment policy for Bryan County has been preserved, was argued in the courts below, and is properly before this Court.

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1. Footnote 12 is the same note quoted in the County's Brief for Petitioner at p. 19. That footnote demonstrates why Bryan County's stipulation that Sheriff Moore was a policymaker for the sheriff's department is not proof that he had authority to establish final county employment policy.

B. Bryan County Is Not Subject To Liability Under § 1983 For Isolated One-Time Decision To Hire A Particular Officer.

Respondent asserts that *City of Canton v. Harris* "expressly envisions municipal liability based on one poorly trained employee." (Respondent's Brief at p. 26). Measured by the precise words and legal principles expressed in *Canton*, that contention is remarkably misguided.

In *Canton*, Justices White and O'Connor were precise in stating what sort of proof would *not* support municipal liability. Justice White did not mince words: "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."[2] *Canton*, 489 U.S. at 390-391. As a predicate to municipal liability, Justice O'Connor embraced a construction of the term "deliberate indifference" as requiring proof of a *pattern* of violations from which a kind of "tacit authorization" by city policymakers can be inferred."[3] *Id.* at 397. Further, Justice

2. Respondent cites the fact that Burns had employed the arm-bar technique in prior arrests as evidence that Burns "enjoyed" authority. Respondent's Brief at 4. However, the fact that no complaint had ever been made about his use of force while on duty suggests strongly that Burns' training in the proper use of that technique served him, and the sheriff's department, well prior to Jill Brown's complaint. (Tr. 582-83, 628). It certainly could be argued that Burns' history in that respect demonstrated ability to properly carry out law enforcement work without injury to himself or others.

3. The evidence in this case was undisputed that Bryan County had *never* had complaints or lawsuits filed against it in connection with its employment of Reserve Deputies. (Tr. 652). Indeed, during Sheriff Moore's tenure, there had *never* been any complaint made against Bryan County's Sheriff's Department alleging that officers or deputies were abusive to citizens or otherwise engaged in misconduct. (J.A. 112a).

O'Connor agreed with *Tuttle* that "isolated misconduct of a single, low-level officer" would not support municipal liability. *Id.*, 399-400, *quoting Oklahoma City v. Tuttle*, 471 U.S. 808, 831 (1985) (Brennan, J., concurring in part and concurring in judgment).

In our case, the Fifth Circuit's opinion imposes liability for the "isolated misconduct" of a "particular" "low-level officer" who is alleged to have been "unsatisfactorily trained" or inadequately screened. Indeed, the jury questions relevant to the County's § 1983 liability are premised on Bryan County's hiring and training policies *only* as they relate to ***"the case of Stacy Burns."***[4] (App. 40a-4(a)). Respondent has written many pages of overwrought analysis of *Canton*, but in the end, *Canton* quite simply defeats her case.

Moreover, Justices White and O'Connor were not writing on a clean slate. Their concurring opinions in the plurality decision of *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) suggest that, for them, "policy" presupposes the enactment of a plan the effects of which have universal application throughout the governmental unit. In *Pembaur*, for example, Justices White and O'Connor emphasized that the city and county's decision to forcibly enter private property to serve capiases was "standard operating procedure," rather than an ad hoc decision limited only to ***"the case of Bertold Pembaur."*** 475 U.S. at 485, 491. The county's "standard operating procedure" reverberated far beyond the particular instance involving Bertold Pembaur, and therefore justified the plurality's holding that the county's "policy" created liability under § 1983.

4. Bryan County objected to the pointed references to Stacy Burns and asked the court to instruct the jury that "one incident of police misconduct or one incident of violation of hiring and training policy cannot in and of itself constitute a policy and cannot grant the right to consider liability on the County in behalf of the Plaintiff." (J.A. 125a, 132a).

Another consideration makes *Pembaur* particularly inapposite. Whereas the forcible-entry decision in *Pembaur* "officially sanctioned or ordered" the violation of Pembaur's Fourth Amendment rights (475 U.S. at 480, 484), Sheriff Moore's decision to hire Stacy Burns was not, by any stretch of the imagination, "the functional equivalent of a decision by the city itself to violate the Constitution." *See Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part). Indeed, there is no evidence that Bryan County was even constructively on notice that Stacy Burns would "likely" or "probably" commit an act of excessive force. At most, the evidence suggested a "potential disposition." (Tr. 316; J.A. 43a). Obviously, if "potentiality" were the standard, municipalities would "potentially" be liable under § 1983 for each and every hiring decision made. We know, however, that § 1983 does not create such *respondeat superior* liability. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 691 (1978).

In any event, it is telling that the circuits have not viewed *Pembaur* as an invitation to expand the scope of municipal liability in a manner that would engulf *Monell*. Even respondent — who professes to have canvassed every single federal circuit decision discussing § 1983 municipal liability since 1985 — cannot point to a single case in which *Pembaur* was utilized to hold that the one-time execution of a facially-constitutional municipal policy properly results in municipal liability. There are numerous cases, however, which hold the opposite. Ironically, the court requiring the most exacting proof of municipal fault has been the Fifth Circuit. *See Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir.), *cert. denied*, 506 U.S. 973 (1992); *Benavides v. County of Wilson*, 955 F.2d 968 (5th Cir.), *cert. denied*, 506 U.S. 824 (1992); *Wassum v. City of Bellaire*, 861 F.2d 453 (5th Cir. 1988); *Stokes v. Bullins*, 844 F.2d 269 (5th Cir. 1988); *Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

II.

RESPONDENT FAILED TO ESTABLISH REQUISITE CAUSATION BETWEEN COUNTY'S HIRING OF STACY BURNS AND ALLEGED CONSTITUTIONAL DEPRIVATION.

In respondent's view, *Canton* envisions municipal liability based on evidence that the municipality failed to properly train or hire one particular officer, even in the absence of evidence of a pattern of deprivations sufficient to place the city on notice of the particular deficiency. (Respondent's Brief at p. 7, n. 10). As demonstrated above, however, that argument is contrary to *Canton*. Perhaps recognizing the defect in that approach, respondent next moves to what becomes the central underlying theme of her brief — that § 1983 liability is the equivalent of common law tort liability and should therefore be analyzed under the same principles.

Respondent attempts to transform her suit against Bryan County into a garden variety common law tort. Respondent's formula for municipal liability, however, ignores the last twenty years of § 1983 jurisprudence, which has established that § 1983 is not a federal negligence statute. There is some irony in the fact that respondent initially recognizes this Court's characterization of causation standards in terms of "direct cause," "closely-related cause" or "affirmative link," yet then equates causation under § 1983 with "the traditional standard of proximate cause." Respondent's Brief at 33. Rather than speculate, the proper focus should be on this Court's own construction of § 1983 "causation."

As a beginning point, Justice O'Connor has observed that "[t]he 'causation' requirement of § 1983 is a matter of *statutory interpretation* rather than of common tort law." *City of Springfield v. Kibbe*, 480 U.S. 257, 269 (1987) (O'Connor, J.,

dissenting from dismissal of writ of certiorari) (emphasis supplied). Consequently, even though § 1983 can properly be described as a species of tort liability, it has a decidedly unique pedigree. *See Martinez v. California*, 444 U.S. 277, 285 (1980); *Daniels v. Williams*, 474 U.S. 327, 330 (1986). It is particularly significant, then, that § 1983's lineage in this Court portrays causation as something more rigid, and less capable of a negligence construction, than proximate cause. Indeed, it has been described as "the functional equivalent of a decision by the city itself to violate the Constitution." *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in part and dissenting in part).

Municipal liability under § 1983 has always been regarded with due deference to the fact that the authors of the Ku Klux Klan Act were antipathetic to the notion of municipal liability in the first place. Thus, *Canton* reminds the reader that municipal liability cannot exist unless "the municipality *itself* causes the constitutional violation at issue." *Id.* at 385 (emphasis in original). That deference is not consistent with the general "foreseeability" component of proximate cause. Accordingly, Bryan County's liability under § 1983 must be measured by the proof required in *Canton* and not lesser standards of common law tort liability. *See Rankin v. City of Wichita Falls, Tex.*, 762 F.2d 444, 448-49 n. 4 (5th Cir. 1985) (different policies behind § 1983 and common law tort liability support judicial reluctance to "conflate section 1983 liability with ordinary tort liability . . .").

Under *Canton*, inadequate training sufficient to establish municipal liability requires proof that "in light of the duties assigned . . . the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Canton*, 489 U.S. at 390. This degree of awareness arises either: (1) when the policymaker knows to a "moral certainty" that his failure to train will result in constitutional violations; or

(2) when the need for training is "plainly obvious" because of frequent constitutional violations. *Id.* at 390 n. 10. In addition, a "very close causal connection" is required in order to prevent federal imposition of "prophylactic" duties upon governments. *Id.* at 395 (O'Connor, J., concurring).

Assuming the Court even recognizes "hiring" decisions as potentially subjecting municipalities to § 1983 liability, the evidentiary standards should at least approximate the dictates of *Canton* with respect to causation. Thus, municipal hiring decisions would be reviewable under § 1983 if a particular hiring practice results in a pattern of constitutional deprivations sufficient to put the municipality on notice of the deficiency.[5] Alternatively, a single hiring decision could subject a municipality to liability if it is clear to a moral certainty that a constitutional deprivation would result.[6] If neither a pattern nor a moral certainty is present, *Canton* does not authorize the imposition of municipal liability.

Respondent asserts that neither deliberate indifference nor causation as described in *Canton* are required in the hiring

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5. For example, although it is constitutional to hire color blind traffic-control officers, experience may establish that such a hiring policy results in a pattern of traffic fatalities. Once on notice of that consequence, a municipality's failure to take corrective measures could conceivably result in liability under § 1983.

6. This situation might arise if a municipality hired an officer despite a psychiatric diagnosis of paranoid schizophrenia manifested by a history of violent attacks, resulting in serious physical injuries, which are certain to recur. In our case, there is no evidence that Stacy Burns, who took an "MMPI" test prior to his formal law enforcement training, suffered from any such malediction. (Tr. 495-96, 578).

context. In her view, *proximate* cause[7] should replace *direct* cause and deliberate indifference should be eliminated altogether. (Respondent's Brief at pp. 29-30 n. 17, 18). She further proposes that deliberate indifference, if retained as a requirement, should be defined in terms of "recklessness" and not "certainty." (Respondent's Brief at p. 30 n. 18). These lesser standards of liability are without support from § 1983 or the Constitution.

This court has never held that a hiring decision, in itself, can subject a city to liability under § 1983. Clearly, providing for municipal liability based on a single hiring decision so closely approximates *respondeat superior* liability as to be virtually indistinguishable. The Court's concerns regarding municipal liability for inadequate training claims are only exacerbated when a municipality's hiring decisions are called into question. Thus, there is even more reason to insist on a rigorous standard for so-called inadequate hiring claims.[8]

Moreover, it is exactly this type of lax interpretation of the municipal liability requirements that would permit back-door

7. Liability would be authorized, under respondent's proximate cause theory, if the municipality has notice of a prospective employee's "tendency" to commit a particular violation which subsequently occurs. However, respondent's evidence falls short even if common law tort principles were to apply. Respondent's expert testified only that Burns' had "a potential" for physical aggression. (Tr. 316; J.A. 43a). The same statement could be made with respect to any candidate for law enforcement service. Indeed, physical aggression is, at least in some respect, a necessary component of law enforcement service.

8. In the end, however, *Canton's* framework for causation may be insufficient in the hiring context. One cannot contest that any constitutional injury would have been avoided if the decision to hire the offending employee had not been made. This inquiry ultimately devolves into but-for causation. This is precisely the nature of *respondeat superior* liability.

vicarious liability "simply because the municipality hired one 'bad apple.' " *Tuttle*, 471 U.S. at 821. Section 1983 is not a "federal good government act" for municipalities. *Canton*, 489 U.S. at 396 (O'Connor, J., concurring). Instead, liability must be "predicated on the municipality's *own* constitutional violations." *Kibbe*, 480 U.S. at 268.[9]

III.

SECTION 1983 DOES NOT PERMIT FEDERAL COURTS TO OVERTURN STATE LEGISLATION WHICH COULD "THEORETICALLY" RESULT IN CONSTITUTIONAL DEPRIVATION.

If causation is relaxed to the point respondent advocates, States that currently do not disqualify police applicants on the ground of prior petty offenses will be compelled to re-evaluate their policies — not because misdemeanor applicants are somehow incapable of rendering superior law-enforcement service, and not because a policy allowing counties to hire applicants with misdemeanor backgrounds is unconstitutional — but because a federal court has decided a county is "precluded" from hiring an officer who pleaded guilty for his role in a college fight.[10] Unquestionably, the Fifth Circuit's holding has that effect.

9. The court's pronouncements arise from important State and local policy concerns. Adopting lesser State tort principles as suggested by respondent would move toward the federalization of State tort law under § 1983. Moreover, applying State tort concepts of proximate cause to 1983 actions would expose municipalities to overwhelming damage liability and allow federal jury second guessing of purely constitutional municipal decisions concerning all manner of day-to-day administration. These federal decisions based on civil rather than constitutional fault would cripple local governments in the management of their affairs.

10. The only evidence of Burns' role in this fight was that he pushed someone who had first pushed him. (J.A. 90a).

Far from rationalizing the Fifth Circuit's nullification of Oklahoma's personnel prerogatives, respondent actually embraces such "federal incursions into essentially state-oriented affairs." (Respondent's Brief at pp. 13-14). She argues that § 1983's primary purpose was to provide federal protection where State laws "*either in theory or in practice*, do not do the trick." *Id.* at 14 (emphasis supplied). The italicized portion of that quote epitomizes the fundamental error in respondent's expansive view of the reach of raw federal power. It is *not* the role of federal courts to examine *theoretical* applications of State law, isolate laws which *potentially* threaten federal rights, and then *exorcise* them as a purely preemptive measure. *See Rizzo v. Goode*, 423 U.S. 362, 379-380 (1976). However, stripped of its dramatic prose, respondent proposes that federal courts fill precisely that role as a "complement" to State law. (Respondent's Brief at p. 14).

Nowhere does the Constitution empower federal courts to revise state laws which are theoretically flawed. Instead, our system of federalism accommodates two seemingly contradictory principles: it rejects the idea of absolute federal prerogative, yet celebrates constitutional supremacy. The real "trick" is to balance these twin towers of government. *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991). In *Gregory*, this Court recognized the advantages of undertaking that balancing effort:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes

> government more responsive by putting the States in competition for a mobile citizenry.

Id. at 458. This federalist structure, properly construed, would recognize that the composition of law enforcement personnel is properly a matter of State law until such time as the State, or its agencies, are placed on notice that application of its law (in practice rather than theory) results in the deprivation of constitutional rights.

In our case, the diversity of laws respecting the selection of law enforcement personnel has been demonstrated in the appendix to the National Association of Counties' *amicus curiae* brief. Some States have no standards, others are quite restrictive. It is far from clear which is "best," which more efficiently dispenses effective law enforcement, or which more zealously guards federal civil rights. It is clear, however, that the States' right of experimentation — their ability to propose laws on widely different theoretical premises — is secured by a proper recognition of federalism. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973). That federalism secures this right is not undermined by the fact that any of these State employment standards could *theoretically* result in the hiring of officers who later commit acts violative of the Constitution.

Finally, respondent consigns *United States v. Lopez*, 514 U.S. __, 115 S. Ct. 1624 (1995) to a footnote and contends it has nothing to say about the interplay between State and Nation under § 1983 and the Constitution. Respondent is, of course, correct in stating that *Lopez* "involved a federal law passed pursuant to the Commerce Clause." (Respondent's Brief at p. 16 n. 12). However, that is a decidedly stingy description of a decision that has far-reaching implications where there is equivalent tension between the domain of States and the realm of

the Nation. Justice Kennedy's concurrence in *Lopez* articulates how federalism affects allocation of power between the States and Nation. That subject is not confined to commerce; indeed, it embraces the entire structure of our government.

Whether reviewing a congressional act or a circuit opinion, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at __, 115 S. Ct. at 1639 (Kennedy, J., concurring). There is reason to intervene here. The Fifth Circuit's opinion elevates the federal judiciary above democratic processes that resulted in Oklahoma's adoption of hiring standards in the first place. If the citizens of Oklahoma determine that those standards are too lax, whom do they hold accountable? The State can deny responsibility because the federal judiciary has now usurped the field. The local sheriff — the person most closely linked to the people — can demur because he is twice-removed from the new federal role. In place of State and local accountability, the Fifth Circuit would substitute federal courts as the final arbiters of personnel standards.

"The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power." *Lopez*, 514 U.S. at __, 115 S. Ct. at 1638-39 (Kennedy, J. concurring).

CONCLUSION

Respondent accuses Bryan County of a litany of bad motives. She suggests that Bryan County filed a petition in this Court simply because it "doesn't like the implications of a federal law" (Respondent's Brief at p. 16 n. 12); that Bryan County is attempting to "repeal" § 1983 (pp. 15, 35-36); and that Bryan County is asking for a license to place "time bombs on our streets and in our schools." (p. 46). Respondent's resort to emotion, rather than reason, infects her analysis of *Canton* and blinds her to the centrality of federalism as it relates to the scope of § 1983 municipal liability.

Bryan County is seeking nothing more than fidelity to *Monell* and *Canton*. The Court's decisions in those cases properly balance the federalism interests which caution against federal courts' usurpation of State laws that neither directly violate constitutional principles nor would "obviously" result in constitutional deprivations.

Respectfully submitted,

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